84-223

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,

vs.

SOUTHWEST MARINE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether truly complete involvement and participation in a monopolistic scheme can be a basis, wholly apart from the idea of in pari delicto, for barring respondent's cause of action under the federal antitrust laws. Perma Life Mufflers Inc. v. International Parts Corp. 392 U.S. 139, 140 (1968)

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IN THE SUPREME COURT
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PETITION FOR WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 732 F.2d 744, appears as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 7, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A drydrock facility ("the Graving Dock") was leased by the United States Navy to the San Diego Unified Port District ("the Port") which permitted its use by defendants herein under an operating agreement.

Petitioner Triple "A" Machine Shop, Inc. ("Triple A"), and other ship repair companies were sued by respondent Southwest Marine, Inc., ("Southwest Marine") a competing ship repair company, for injunctive relief and damages under Sections 1 and 16 of the Sherman Act (15 U.S.C. §§1, 26). Respondent's president and chairman of the board of directors, and dominant shareholder Arthur Engel, is the former general manager of petitioner's San Diego-based division ("Triple A South") and a nephew of petitioner's president and chairman of the board, Albert Engel. Arthur Engel was a shareholder of petitioner and participated in its profit sharing fund. (Tr. Vol. IX 1332)

As petitioner's general manager, Arthur Engel drafted, negotiated and executed an agreement on petitioner's behalf with other ship repair companies (all defendants in this action), referred to as the "User's Agreement", which governed the use by petitioner and others of the Graving Dock. (Tr. Vol. X 1422) The User's Agreement, which was the subject of this action, permitted the ship repair companies to use the Graving Dock and imposed certain financial and experience requirements on prospective new users.

During negotiations with the Port and the participating companies and in discussions with the Navy prior to the simultaneous execution of the Navy's

lease and the User's Agreement, Arthur Engel was petitioner's only representative. (Tr. Vol. IX 1276 and 1309) As petitioner's agent he recommended restrictive terms for incorporation into the User's Agreement, for example, that it permit "the application of additional participants only on the anniversary date" of the User's Agreement, that is, at the end of its five year term. (Def.Ex.D, Tr. Vol. IX 1284-1286) He made that recommendation because he "wanted to to [sic] have some sort of a restriction as to when the companies, additional companies could become a member." (Tr. Vol. IX 1285-1286) The only information which petitioner ever received about the

proposed User's Agreement came from Arthur Engel. (Tr. Vol. IX 1276 and 1309)

Just two months before causing the incorporation of plaintiff, which the jury found to be his alter ego, Arthur Engel executed the Users Agreement on behalf of Triple A (Tr. Vol. IX 1312, Special Verdict, Issue 5, 260). The jury's finding was supported by substantial evidence of alter ego. (Tr. Vol. VIII 1157-1159, Vol. IX 1350-1351, Vol. IX 1312-1319 and 1321-1324)

Arthur Engle testified that he was the representative of Triple A who "combined, contracted, agreed, and conspired in violation of the Sherman Act to unreasonably restrain trade in

the ship construction, repair and renovation market...' (Tr. Vol. IX 1326-1327) and he also stated that he had "drafted and executed [an agreement] to Triple 'A' South's benefit, and in the event that he needed to do something else he knew how to break it..." (Tr. Vol. X 1422-1423)

Within two months of drafting the Users Agreement, Arthur Engel resigned from petitioner and formed respondent Southwest Marine as a competing ship repair company in the San Diego area. He thereafter requested, only as to his new company, respondent, a waiver of the terms concerning financial and experience requirements in the User's Agreement. When petitioner and the

other defendants below would not agree to a special waiver for Arthur Engel's new business alone, this antitrust suit was filed in the name of respondent Southwest Marine against the parties to that agreement. As alleged herein, respondent Southwest Marine was unlawfully excluded from the Graving Dock pursuant to the terms of the User's Agreement Arthur Engel negotiated and signed on petitioner's behalf.

These facts are undisputed.

PROCEDURAL HISTORY OF THE ACTION

At the district court, respondent sought a preliminary injunction enjoining the enforcement of the User's Agreement against it, and that

injunction motion was denied. Sometime thereafter, defendant National Steel and Shipbuilding Co. ("NASSCO") voluntarily made the Graving Dock available to respondent through a series of partial assignments.

Respondent's damage claim was then tried to the jury. In special verdicts, the jury found certain terms of the User's Agreement unreasonable. (Tr. Vol. XIV 11) However, the jury also found that respondent was the "alter ego" of Arthur Engel and that Arthur Engel was therefore in pari delicto with petitioner and the other defendants below because he had negotiated and executed the User's Agreement upon which respondent's

antitrust action was based. (Tr. Vol. XIV 12) Thereafter, the district court denied respondent's post-trial motions for permanent injunctive relief, for attorneys' fees, and for judgment notwithstanding the verdict.

The Ninth Circuit reversed the jury's finding of respondent's truly complete involvement. (Appendix A) The Court below found that the "narrow reach" of it's prior decision in Javelin Corp. v. Uniroyal, Inc. 546 F.2d 276 (9th Cir. 1976), cert. denied, 431 U.S. 938 (1977), discussing a plaintiff's truly complete involvement and participation in an antitrust conspiracy, does not bar Arthur Engel's new company (respondent) from recovery based upon

the contract he originally negotiated and executed, notwithstanding the jury's findings on the alter ego issue.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

In this action, the United States Court of Appeals for the Ninth Circuit has effectively emasculated both the truly complete involvement standard set out in Perma Life, supra, and the alter ego doctrine.

Even if this case involved only the rights of the litigants, it is substantial in its impact. The Ninth

Circuit now permits antitrust recovery by the alter ego of the instigator of an illegal conspiracy.

Such a result is contrary to the equities and federal law established by this Court.

But the effect of this litigation is far broader than the rights of the litigants. Even more significant is the long-range impact of this action on the enforcement of antitrust claims by any originator and participant in an antitrust conspiracy. Such plaintiff need only shift entities for purposes of litigation to escape the reach of the antitrust laws.

Additionally, the Circuits are divided in their interpretation and application of the "truly complete

involvement" standard enunciated in Perma Life Mufflers Inc. v. International Parts Corp. 392 U.S. 141 (1968).

The judgment of the United States Court of Appeals for the Ninth Circuit is erroneous and in conflict with its own decisions, with substantial rulings of this Court and with the other United States Courts of Appeals, as shown by the following sections. Such significant conflicts should be resolved.

THE CIRCUITS ARE IN NEED OF CLARIFICATION OF THE TRULY COMPLETE INVOLVEMENT STANDARD

It has been sixteen years since the United States Supreme Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S.

134, 140 (1968) stated:

> "We...hold that the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.
>
> Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiffs' cause of action..."

It is time for that question to be decided.

The Ninth Circuit summarized the various circuits' interpretations of the truly complete involvement standard in Javelin Corp. v. Uniroyal Inc., 546 F.2d 276 (1976):

> The [Supreme] Court did not give any guidelines as to what degree of involvement might bar a

plaintiff other than to decide that the franchising scheme involved in Perma Life did not present such a case.

The courts have struggled with this imprecise standard ever since. In Premier Electrical Construction Co. v. Miller-Davis Co., 422 F.2d 1132 (7 Cir. 1970), The Seventh Circuit said:

> "[W]e believe that Perma Life holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants." 422 F.2d at 1138. (emphasis added).

Thus, only a co-equal in the conspiracy would be barred.

Such a situation faced this court in Dreibus v. Wilson, 529 F.2d 170 (9 Cir. 1975). The plaintiff was a co-founder and 50% shareholder of the allegedly wrongdoing corporation. The court adopted the reasoning of the district court's opinion,

which stated:

> "[E]ven if the establishment of this dealership could constitute monopolization, the plaintiffs cannot recover for it. By their own allegations, plaintiffs are the originating, active persons responsible for its establishment. Although the Supreme Court abolished in pari delicto as a defense in antitrust cases, the court [sic] indicated that a high degree of involvement in the illegal act could constitute a defense." 529 F.2d at 174 (citations omitted).

The Fifth Circuit in Greene v. General Foods, 517 F.2d 635 (5 Cir. 1975), broadly suggested that it would not maintain any in pari delicto type defense, but it expressly did not rule on this point. The court stated:

> "We have no occasion here to consider to what extent the 'in pari delicto' doctrine will continue to function in private antitrust litigation, if indeed the plaintiff is equally responsible, or a co-adventurer. * * * Even if

> we accept General Foods' argument that in pari delicto and closely related equitable defenses such as consent and unclean hands are still viable after Perma Life - an argument we seriously question - the record shows a great disparity between the plaintiff and the defendant..." 517 F.2d at 646-47.

Cf. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5 Cir. 1975) (while no bar, plaintiffs' participation may reduce damages).

Other circuits have emphasized that the plaintiff's participation must be in the formulation stage of a conspiracy to bar recovery. In South-East Coal Co. v. Consolidation Coal Co. 434 F.2d 767 (6 Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1682, 29 L.Ed.2d 149 (1971), the Sixth Circuit approved an instruction to the effect the plaintiff could not recover if "equally responsible with defendants in the formation of said conspiracy." 434 F.2d at 784. See also Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3

(4 Cir. 1971).

> Such decisions seem to temper Perma Life's apparent abolition of the in pari delicto defense. See ABA Antitrust Development 298 (2d ed. 1975). We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of Perma Life and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy.

THE NINTH CIRCUIT IS IN CONFLICT WITH ITS OWN DECISIONS AND WITH SUBSTANTIAL RULINGS OF THIS COURT

In Javelin, supra, the Ninth Circuit interpreted the Supreme Court's truly complete involvement standard as follows:

> The in pari delicto defense, at the time of the Perma Life decision in 1968, already was not available as a defense in cases involving economic coercion where the plaintiff had no choice but to deal with the defendant and the restraints were largely for defendant's benefit. See Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051,

12 L.Ed.2d 98 (1964). It seems clear, then, that the Court intended to go well beyond such a case of involuntary participation in Perma Life.

546 F.2d at 278, note 2

The Ninth Circuit then held:

A plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation. To satisfy this test, the jury must necessarily find that the degree of participation of the plaintiff must be equal to that of any defendant and a substantial factor in the formation of the conspiracy. The instigator of an illegal scheme clearly is barred under this test.

546 F.2d at 280 (emphasis added).

In the opinion below, the Ninth Circuit acknowledged the jury's finding:

> "...that Southwest Marine was the alter ego of its president, Arthur Engel", stating that "[t]o find Southwest Marine barred from recovering...the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly."

Southwest Marine v. Campbell Industries, 732 F.2d 744, 746 (9th Cir. 1984)

The court then reversed the jury's finding:

> Given the narrow reach of the Javelin defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We therefore find that Javelin does not bar Southwest Marine from recovering against appellees.

732 F.2d at 746

The holding ignores the rule in Javelin and reduces the alter ego doctrine to an absurdity.

Without further discussion, the Ninth Circuit set aside that portion of the special verdict finding truly complete involvement; it refused to attribute Arthur Engel's acts to his alter ego.

Under this new Ninth Circuit rule one who originates, effectuates and encourages the continuation of an antitrust conspiracy may now evade the antitrust laws by simply creating an entity which is his alter ego through which to participate in the illegal scheme.

Such a rule ignores the letter and spirit of the Supreme Court's opinion in Perma Life.

By assuring Arthur Engel illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, this holding encourages what the Sherman Act was designed to prevent.

See Perma Life, supra, 392 U.S. 134, 146.

Justice Marshall has stated:

> "...I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress - in the form of treble damages - from a partner who is no more responsible for the existence of the illegality than the plaintiff.

392 U.S. at 151.

The hypothetical fact situation presented in the Perma Life decision is now squarely before the Court. The Court's supervision is needed to resolve the conflicts in the Ninth Circuit itself and between the circuit courts.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the question presented is worthy of consideration by the Court.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the Ninth Circuit

For Publication

NO. 81-5350
NO. 81-5477
USDC NO. CV-78-106-EBG

Southwest Marine, Inc., a California corporation,
Plaintiff/Appellant,

vs.

Campbell Industries, a California corporation; San Diego Marine Construction Corp., a California corporation; National Steel and Shipbuilding Co., a Nevada corporation; Triple A Machine Shop, Inc., a California corporation; and San Diego Unified Port District, a California corporation,
Defendants-Appellees.

Southwest Marine, Inc., a California corporation,
Plaintiff-Appellee,

vs.

Campbell Industries, a California corporation, et al.,
Defendants,
National Steel and Shipbuilding Co. and
Triple "A" Machine Shop, Inc.,
Defendants-Appellants.

OPINION

[Filed May 7, 1984]

Appeal from the United States District Court
for the Southern District of California
Hon. Earl Ben Gilliam, Judge Presiding
Argued and Submitted: November 1, 1982
Before: FLETCHER, NELSON, and REINHARDT,
Circuit Judges.

PER CURIAM:

A drydock facility in San Diego Bay was jointly operated by Campbell Industries, San Diego Marine Construction Corp., Atkinson Marine Corp., Triple A Machine Shop, Inc., and National Steel and Shipbuilding Co. Use of the dock was governed by a written agreement between these parties which restricted use to the signatories. Other companies were granted access to the dock only if they met certain requirements set forth in the User's Agreement.

Arthur Engel had been the general manager of Triple A at the time the User's Agreement was executed. He later left Triple A and became President and Chairman of the Board of Southwest Marine, a competing ship repair company. Southwest Marine was denied access to the dock pursuant to the User's Agreement.

Southwest Marine sued National Steel and Shipbuilding Co. and Triple A Machine Shop, Inc. for injunctive relief and damages, alleging a conspiracy in restraint of trade under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). After the district court denied the request for injunctive relief, National Steel and Shipbuilding Co. voluntarily made the dock available to Southwest Marine through a series of partial assignments. The damages claim proceeded to trial. The jury, in a special verdict, found for Southwest

Marine on the issue of liability, but also found that Southwest Marine was barred from recovering damages by its "truly complete involvement" in the formation of the illegal scheme. Southwest Marine moved for judgment notwithstanding the verdict. The district court denied the motion, entered judgment for the defendants, and denied Southwest Marine's motion for injunctive relief and related attorney's fees. Southwest Marine appeals from that denial. Appellees cross-appeal, claiming that because the jury was inadvertently exposed to inadmissible documents, they are entitled to a new trial if we hold for the appellants. Since there was insufficient evidence to support the jury's finding of truly complete involvement, we reverse and remand.

TRULY COMPLETE INVOLVEMENT

To encourage private antitrust actions, the Supreme Court has refused to recognize the defense of *in pari delicto* in antitrust cases. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968). The *Perma-Life* Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause for action." *Id.*

This court faced the unresolved issue of *Perma-Life* in *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied when the jury has found that the plaintiff's degree of participation is "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Id.* at 279.

Plaintiff Southwest Marine, as a corporate entity, was not at all involved in the formation of the User's Agreement. The jury found, however, that Southwest Marine was the alter ego of its president, Arthur Engel. To find Southwest Marine barred from recovering, therefore, the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly. Given the narrow reach of the *Javelin* defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We therefore find that *Javelin* does not bar Southwest Marine from recovering against appellees.

ATTORNEY'S FEES

An antitrust plaintiff who "substantially prevails" in an action for injunctive relief is entitled to attorney's fees. 15 U.S.C. § 26 (1976) (as amended). The district court improperly rejected Southwest Marine's petition for attorney's fees for services rendered in attempting to obtain injunctive relief.

The legislative history of the 1976 amendment to section 26 suggests that awards of attorney's fees are essential if private attorneys-general are to enforce the antitrust laws. *See* 1976 U.S. Code Cong. & Admin. News 2572, 2588-90. To permit defendants to avoid the award of attorney's fees in suits for injunctive relief by ceasing their illegal conduct would reduce the incentive to bring suit, thereby frustrating Congress's intent. Thus, we choose to apply the standard developed under 42 U.S.C. § 1988 (1976) to awards under section 26.

Under 42 U.S.C. § 1988 a plaintiff may be awarded attorney's fees if he is a "prevailing party." In *American Constitutional Party v. Munro,* 650 F.2d 184 (9th Cir. 1981), we held that a plaintiff need not obtain formal relief to recover fees. Rather, for there to be a "prevailing party," there must simply be a causal relationship between the litigation brought and the practical outcome realized. *Id.* at 187; *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1293 (9th Cir. 1983). As a result of the action filed by plaintiff, the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co. Thus, whether or not plaintiff ultimately prevails on damages on remand, it has "prevailed" within the meaning of 42 U.S.C. § 1988 (1976). *See Maher v. Gagne,* 448 U.S. 122 (1980); *Virginia Academy of Clinical Psychologists v. Blue Shield,* 543 F. Supp. 126, 130 (E.D. Va. 1982). The amount of fees ultimately awarded must await final disposition of the suit by the district court.

CONCLUSION

That portion of the special verdict finding truly complete involvement on the part of Southwest Marine is set aside due to insufficient evidence. We remand to the district court to determine whether National Steel and Shipbuilding Co. and Triple A are entitled to a new trial on the issue of liability because the jury was exposed to documents that were not admitted into evidence. If the district court decides that a new trial is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment.

REVERSED AND REMANDED.

84-223 (2)

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OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 14, 1984

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2017

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OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC., Petitioner,

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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September 14, 1984

On August 6, 1984, petitioner Triple "A" Machine Shop, Inc. filed its Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit with the United States Supreme Court. Attached thereto as Appendix A is the opinion of the United States Court of Appeals for the Ninth Circuit (reported at 732 F.2d 744), from which this petition is based. Unbeknown to petitioners at that time, the Ninth Circuit amended a portion of its May 7, 1984 opinion, as to an attorneys' fees ruling which is not raised in this petition. In all other respects, the amended opinion is identical to the May 7, 1984 opinion previously attached as Appendix A.

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed July 11, 1984, appears as Appendix A hereto.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals
For the Ninth Circuit

For Publication

NO. 81-5350
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Defendants,
National Steel and Shipbuilding Co. and Triple "A" Machine Shop, Inc.,
Defendants-Appellants.

OPINION

As Amended July 11, 1984

Appeal from the United States District Court for the Southern District of California.

Before FLETCHER, NELSON, AND REIHNARDT, Circuit Judges.

PER CURIAM:

A drydock facility in San Diego Bay was jointly operated by Campbell Industries, San Diego Marine Construction Corp., Atkinson Marine Corp., Triple A Machine Shop, Inc., and National Steel and Shipbuilding Co. Use of the dock was governed by a written agreement

between these parties which restricted use to the signatories. Other companies were granted access to the dock only if they met certain requirements set forth in the User's Agreement.

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Southwest Marine sued National Steel and Shipbuilding Co. and Triple A Machine Shop, Inc. for injunctive relief and damages, alleging a conspiracy in restraint of trade under sec-

tion 1 of the Sherman Act, 15 U.S.C. § 1 (1976). After the district court denied the request for injunctive relief, National Steel and Shipbuilding Co. voluntarily made the dock available to Southwest Marine through a series of partial assignments. The damages claim proceeded to trial. The jury, in a special verdict, found for Southwest Marine on the issue of liability, but also found that Southwest Marine was barred from recovering damages by its "truly complete involvement" in the formation of the illegal scheme. Southwest Marine moved for judgment notwithstanding the verdict. The district court denied the motion, entered judgment for the defendants, and denied Southwest Marine's motion for injunc-

tive relief and related attorney's fees. Southwest Marine appeals from that denial. Appellees cross-appeal, claiming that because the jury was inadvertently exposed to inadmissible documents, they are entitled to a new trial if we hold for the appellants. Since there was insufficient evidence to support the jury's finding of truly complete involvement, we reverse and remand.

TRULY COMPLETE INVOLVEMENT

To encourage private antitrust actions, the Supreme Court has refused to recognize the defense of in pari delicto in antitrust cases. Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968). The

Perma-Life Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiff's cause of action." (Id.)

This court faced the unresolved issue of Perma-Life in Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir.1976), cert. denied, 431 U.S. 938, 97 S.Ct. 2651, 53 L.Ed2d 256 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied when the jury has found that the plaintiff's degree of participation is

"equal to that of any defendant and a substantial factor in the formation of the conspiracy." (Id. at 279.)

Plaintiff Southwest Marine, as a corporate entity, was not at all involved in the formation of the User's Agreement. The jury found, however, that Southwest Marine was the alter ego of its president, Arthur Engel. To find Southwest Marine barred from recovering, therefore, the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly. Given the narrow reach of the Javelin defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We there-

fore find that Javelin does not bar Southwest Marine from recovering against appellees.

ATTORNEY'S FEES

An antitrust plaintiff who "substantially prevails" in an action for injunctive relief is entitled to attorney's fees. 15 U.S.C. § 26 (1976)(as amended). The district court improperly rejected Southwest Marine's petition for attorney's fees for services rendered in attempting to obtain injunctive relief.

The legislative history of the 1976 amendment to section 26 suggests that awards of attorney's fees are essential if private attorneys-general are to enforce the antitrust laws. See 1976 U.S.Code Cong.& Admin.News 2572,

2588-90. To permit defendants to avoid the award of attorney's fees in suits for injunctive relief by ceasing their illegal conduct would reduce the incentive to bring suit, thereby frustrating Congress's intent.

A number of district courts that have examined the Section 16 attorney's fees provision have considered the question whether it is proper to infer that Congress intended that the identical language in the section 16 and section 1988 attorney's fees provisions be identically construed. Each of these courts concluded that the "prevailing party" standard was the same under the two statutes. As the court in Gruman Corp. v. LTV Corp., 533 F.Supp. 1385, 1387 (E.D.N.Y.1982), explained, "it is

more appropriate to presume that Congress intended [that] identical language found within Section 16 and Section 1988 attorney's fees provisions, which were enacted by the same Congress, would be identically construed.... This conclusion is corroborated by the negative inference which we draw from an examination of a host of statutes where Congress has expressly imposed the requirement of a final judgment as a condition precedent for plaintiff's recovery of attorney's fees." See also F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F.Supp. 203, 206 (S.D.N.Y.1979) (relying on case law developed under section 1988 in ruling that "[t]he appropriate benchmarks in determining which party pre-

vailed are a) the situation immediately prior to the commencement of the suit, and b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two."); Harnischfeger Corp. v. Paccar, Inc., 503 F.Supp. 102, 104-5 (E.D.Wis.1980)(relying on F. & M. Schaefer standard in ruling that a party which obtained a preliminary injunction preventing a corporate acquisition alleged to be in violation of the Clayton Act could be considered a prevailing party even through the court never issued a final judgment on the merits).

We have never decided the question whether it is appropriate to apply the standard developed under section 1988

to awards under section 16 of the Clayton Act, and we know of no circuit court that has specifically addressed this question. We do, however, find the reasoning in the cases cited above persuasive and choose to apply the standard for determining a "prevailing party" developed under section 1988 to awards under section 16.

Under 42 U.S.C. § 1988 a plaintiff may be awarded attorney's fees if he is a "prevailing party." In American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir.1981), we held that a plaintiff need not obtain formal relief to recover fees. Rather, for there to be a "prevailing party," there must simply be a causal relationship between the litigation brought and the

practical outcome realized. (Id. at 187); Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1293 (9th Cir.1982). As a result of the action filed by plaintiff, the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co. Thus, whether or not plaintiff ultimately prevails on damages on remand, it has "prevailed" within the meaning of 42 U.S.C. § 1988 (1976). See Maher v. Gagne, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980); Virginia Academy of Clinical Psychologists v. Blue Shield, 543 F.Supp. 126, 130 (E.D. Va.1982). The amount of fees ultimately awarded

must await final disposition of the suit by the district court.

CONCLUSION

That portion of the special verdict finding truly complete involvement on the part of Southwest Marine is set aside due to insufficient evidence. We remand to the district court to determine whether National Steel and Shipbuilding Co. and Triple A are entitled to a new trial on the issue of liability because the jury was exposed to documents that were not admitted into evidence. If the district court decides that a new trial is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgement. REVERSED and REMANDED.

(3)

No. 84-223

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,

vs.

SOUTHWEST MARINE, INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

A uniquely large drydock facility (the "Graving Dock") was leased by the United States Navy to the San Diego Unified Port District (the "Port"). The Port entered into an operating agreement (the "Users' Agreement") with Triple "A" Machine Shop, Inc. ("Triple") and other ship repair companies located in San Diego.

The Users' Agreement provided for the operations and maintenance of the Graving Dock and assessed certain charges for the use of the facility. If the operations produced a net profit, such profit would be distributed pro rata among the commercial users.

This Users' Agreement restricted the use of the Graving Dock to the original commercial users and new users which, upon application to the Port, were able to meet requirements of Sections 32(b) and (c) of the Users' Agreement applicable only to prospective new users. These sections required (1) twenty four months of ship repair experience, (2) the capability to perform all of the work generally done in the Graving Dock without resort to subcontractors and (3) a net worth of five million dollars or the posting of a performance bond in that amount.

The president of Southwest was at all relevant times one Arthur E. Engel. At the time the Users' Agreement was executed, Arthur Engel was the general manager of Triple "A" South, the San Diego operating division of Triple. Within the course and scope of this employment and with the express consent of his employer, Arthur Engel executed the Users' Agreement in June of 1976 on behalf of Triple. (Tr. Vol. III 339)

Defendant National Steel and Shipbuilding Company ("NASSCO") admitted initiating the substantive requirements of Sections 32(b) and (c). (Tr. Vol. VIII 1093-1094) This admission was confirmed by the Port. (Tr. Vol. IX 1252) NASSCO's Vice President explained that he reviewed his concept with Arthur Engel, but it was not a lengthy conversation in which Engel was bringing up his own suggestions. (Tr. Vol. II 193)

Respondent Southwest Marine, as a corporate entity, was not at all involved in the formation of the Users' Agreement.

In July of 1976 Arthur Engel left the employment of Triple. He formed his own competitive ship repair company, Southwest, in August of 1976. From humble beginnings, Southwest quickly grew to an employer of several

hundred with annual sales of several million dollars, concentrating on the repair of ships for the United States Navy.

In spite of this commercial success, Southwest was foreclosed from one major market. Certain repair contracts for the United States Navy, due to the size of the ship and the Navy's "home port" repair policy, required the utilization of the San Diego Graving Dock. Although any holder of a Navy-issued Master Ship Repair Contract could bid on such repair contracts, any low bidder would be required to demonstrate that it had access to the San Diego Graving Dock as part of a pre-award survey.

In early 1977, Southwest contemplated bidding on certain Navy repair contracts requiring the use of the Graving Dock. As Southwest was not a user company under the Users' Agreement, it proposed to perform the repairs itself by subcontracting the actual docking and undocking to a user company. To this end, Southwest requested bids from NASSCO, Triple and the other users. Each refused to bid as a subcontractor providing such docking services.

In June of 1977, Southwest made application to the Port to become an additional user company. Although Southwest personnel had both considerable experience in the ship repair industry and the ability to post five million dollars in liability insurance, it could not meet the precise requirements of Sections 32(b) and (c) as interpreted and enforced by NASSCO, Campbell Industries and Triple.

The Port took the position that the Users' Agreement was a contract, not a regulatory ordinance of the Port, and could not be modified without the consent of all parties. (Tr. Vol. VIII 1094-1095) Triple and the other users refused to modify or expansively interpret the requirements of Sections 32(b) and (c), and affirmatively enforced these restrictive provisions with the effect of excluding Southwest

from competing for those Naval repair contracts requiring the use of the Graving Dock.

Neither Southwest Marine nor Arthur Engel participated in the interpretation or enforcement of Sections 32(b) and (c). (Tr. Vol. VIII 1097)

At a June, 1977 hearing, Triple A objected to any amendment or interpretation which would permit Southwest Marine to have access to the Graving Dock. (Tr. Vol. X 1373, Vol. III 399-400)

PROCEDURAL HISTORY OF THE ACTION

Southwest Marine initiated this action in February of 1978.

Respondent's early motion for a preliminary injunction barring enforcement of Sections 32(b) and (c) was denied. Respondents' motion to strike *Parker v. Brown* and *Noerr-Pennington* defenses asserted in defendants' answers was granted. *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307 (1943), *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S. Ct. 523 (1961), *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S. Ct. 1585 (1965).

The jury, in special verdict, found the experience and financial requirements as set forth in the Users' Agreement to be unreasonable under Section 1 of the Sherman Act, and further found these requirements to have unreasonably restrained interstate trade or commerce and to have been the proximate cause of damage to Southwest Marine. (Tr. Vol. XIV 11) These portions of the verdict are not the subject of the petition for writ.

The jury further found Arthur Engel to be *in pari delicto* with the defendants in an unreasonable restraint of trade or commerce and found Arthur Engel to be the alter ego of Southwest Marine. (Tr. Vol. XIV 12)

It is this finding of *in pari delicto* which is the central issue of the petition.

REASONS FOR DENYING THE WRIT

The holding of the Ninth Circuit in *Southwest Marine, Inc. v. Campbell Industries,* 732 F.2d 744 (9th Cir. 1984) was limited and entirely consistent with both *PermaLife Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134 (1968) and *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir. 1976), *cert. den.,* 431 U.S. 938 (1977).

The Circuit Court made two preliminary findings that led to the ultimate holding. First, Southwest Marine, as a corporate entity, was not at all involved in the formation of the Users' Agreement. Second, Arthur Engel's actions with respect to the Users' Agreement were carried out as the agent of Triple A and not in his individual capacity. *Southwest Marine,* 732 F.2d at 746.

The jury was presented with substantial and uncontroverted evidence that defendant NASSCO originated the concept of Sections 32(b) and (c), and that NASSCO and other defendants interpreted and enforced these sections in a fashion which excluded Respondent from the Graving Dock. (Tr. Vol. IX 1256-1257, Vol. II 232-236, Vol. VIII 1094-1095, Vol. X 1373, Vol. II 222, Vol. VIII 1097) Neither Arthur Engel nor Southwest Marine participated in these acts of interpretation or enforcement which gave rise to the unlawful exclusion and resulting damages.

In sum, Arthur Engel neither actively supported the entire restrictive program, nor did he participate in his individual capacity in the formulation of the scheme or in any capacity to encourage its continuation. The question presented by the Petition is, in fact, not raised by the record on appeal.

In *Southwest Marine,* the Ninth Circuit set aside that portion of the special verdict finding truly complete involvement on the part of Southwest Marine due to insufficient evidence, not because of any change in substantive law. Petitioner pictures Respondent and Arthur Engel as actively supporting the entire scheme, participating in its formulation and encouraging its continuation. This factual picture is utterly refuted by the record, making this the inappropriate case to determine whether such involvement and active participation could bar a plaintiff's cause of action.

THE NINTH CIRCUIT IS IN HARMONY WITH ITS OWN DECISIONS AND RULINGS OF THIS COURT

To encourage private antitrust actions, this Court has refused to recognize the defense of *in pari delicto* in antitrust cases. *PermaLife Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 140 (1968), *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation,* 456 U.S. 556, 102 S. Ct. 1935, 1943 n. 6 (1982). The *PermaLife* Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's cause for action." 392 U.S. at 140.

The Ninth Circuit faced this unresolved issue in *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir. 1976) *cert. den.,* 431 U.S. 938 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied where the plaintiff's degree of participation is "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Id.* at 279.

This Court denied the petition for certiorari arising from *Javelin* in 1977. The limited holding of *Southwest Marine v. Campbell, supra,* is consistent with *Javelin* and does not require substantive review by this Court.

The Ninth Circuit simply found that neither Southwest Marine nor Arthur Engel had either participated to a degree equal to that of any defendant or had been a substantial factor in the formation of the conspiracy.

In suggesting prospective answers to the unanswered question of *PermaLife*, the primary articulated concern of the Court was the fashioning of a rule which would enhance the deterrence of the antitrust laws by providing a positive incentive to bring suit in appropriate cases while avoiding the unjust enrichment of a plaintiff through receipt of profits if the illegal restraint succeeds and treble damages should it fail.

Assuming, as the courts have, that maximization of deterrence outweighs the anomaly of allowing a wrongdoer to recover, the policy objective should be a rule which provides the greatest deterrence benefit while generating the least positive incentive to illegal conduct.

The rule of *Javelin* does this by requiring satisfaction of the dual requirements that the participation of the plaintiff must be both:

1. equal to that of any other defendant; and

2. a substantial factor in the formation of the conspiracy.

That this rule produces the desired policy results may be easily illustrated.

Assume competitors in a given market agree to a scheme which would unreasonably restrict competitive entry into that market. Each of the three co-conspirators participates equally in this formative meeting, and the parties ultimately agree to the restraint. At this point, any determination under *Javelin* is premature. *Javelin* forces the Court to further evaluate the equality of participation in the active

conspiracy — subsequent acts of implementation and encouragement must be evaluated.

Both *PermaLife* and *Javelin* dictate that if one of the employees of the co-conspirators who knows of the scheme through his direct participation in its formulation should withdraw from the conspiracy and voluntarily leave his employment (and his agency relationship) to form a competitive entity which enters the market in question, he should not be barred from bringing suit to terminate the scheme and recover damages arising subsequent to such withdrawal.

In this illustrative example, the prospective plaintiff has not benefited from his participation in the formation of the restraint. He is not one who stands to either benefit from illegal profits if the restraint succeeds or from treble damages if it fails. He is, however, the one most likely, based upon economic incentive, to bring the desirable antitrust action and is in unique possession of evidence which may otherwise go undiscovered, given the invariably covert nature of most unlawful trade restraints.

Under these circumstances, the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

The rule of *PermaLife* and *Javelin* operates to attribute fault and deny treble damages only to the plaintiff whose acts have been a proximate cause equal to that of any other defendant of the specific injury for which treble damages are sought. The rule does not enrich a co-conspirator for those damages which it has caused, but does provide a positive economic incentive to a former conspirator to take steps to withdraw from the conspiracy.

Petitioner argues that the Ninth Circuit opinion in *Southwest* permits one who originates, effectuates and encour-

ages the continuation of an antitrust conspiracy to evade the antitrust laws by simply creating an alter ego. The opinion does no such thing.

The damages from which Southwest Marine sought relief all arose from its exclusion from the Graving Dock. This exclusion was proximately caused by the decision of defendants Triple A, NASSCO and Campbell to interpret the Users' Agreement to exclude Southwest, and by these defendants' second, concerted decision to deny Southwest's request to amend the Users' Agreement. These decisions, independent of any participation by either Southwest or Arthur Engel, proximately caused the damages suffered by Southwest.

This ruling is both consistent with *PermaLife* and sound legal and economic policy.

RULING OF OTHER CIRCUITS ARE IN HARMONY WITH JAVELIN AND SOUTHWEST MARINE

Circuits other than the Ninth have also adopted rules under *PermaLife* which consistently require that defendants demonstrate that the plaintiff has willingly participated in the formulation and execution of the scheme and bears equal responsibility for the consequent restraint of trade before the doctrine of "*in pari delicto* plus" may be defensively used.

Petitioner cites several cases from the circuits and argues they are in conflict.

South-East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970), *cert. den.*, 402 U.S. 980, 91 S. Ct. 1682, is cited as having approved an instruction to the effect the plaintiff could not recover if "equally responsible with defendants in the formation of said conspiracy" and is characterized by Petitioner as emphasizing that "the plain-

tiff's participation must be in the formulation stage of a conspiracy to bar recovery." (Petition for Writ 17)

In fact, the relevant portion of the instruction in question places equal emphasis on initiation and continuous, active participation, expressly stating that even a fully equal participant may recover damages arising subsequent to withdrawal from the conspiracy.[1]

Petitioner further cites *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) as illustrative of the Fourth Circuit's emphasis on participation at the formation stage. In fact the *Columbia Nitrogen* court clearly explained that voluntary formulation and equal participation in the illegality are required to support a finding of *in pari delicto* in antitrust cases. That the as-

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[1]The defendants have entered the defense of "*in pari delicto*" – this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy. Under this defense, the Court charges you that *if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.*

"Now, a person may be a party to such an arrangement, be '*in pari delicto*,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, *yet if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover*, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy. Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal." 434 F.2d at 784. [Emphasis added]

serted defense requires both mutual participating in the formulation and execution of the scheme and equal responsibility for the consequent restraint of trade was more recently underscored in *Burlington Industries v. Milliken & Co.*, 690 F.2d 380, 387 (4th Cir. 1982), *cert. den.*, 103 S. Ct. 1893, 1983.

> Columbia's counterclaim is the type of case the Court [in *PermaLife*] expressly excluded from the scope of its opinion. Separate opinions in *PermaLife* representing the views of five of the members of the Court, however, provide guidance for the resolution of this issue. These opinions teach that when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme *and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other.*
>
> We think it plain, therefore, that a party, who *voluntarily formulates and equally participates in* a noncoercive agreement for reciprocal dealing until a declining market makes its purchases unprofitable, cannot maintain an action under Section 1 of the Sherman Act against its trading partner. 451 F.2d at 15-16. [Emphasis added]

Other opinions of the circuit courts cited by Petitioner are easily reconciled with *PermaLife, Javelin* and *Southwest.*

The Petitioner cites pure dictum from the Fifth Circuit in *Greene v. General Foods,* 517 F.2d 635 (5th Cir. 1975) which has not been translated into any holding of that court in the intervening nine years yet ignores the later holding of *Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897, 902 (5th Cir. 1979) which attempts to recon-

cile the post-PermaLife holdings of the Second, Fourth, Seventh and Ninth Circuits.

Driebus v. Wilson, 529 F.2d 170 (9th Cir. 1970) was a shareholders derivative action for damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2. The Ninth Circuit properly dismissed the action where, on the face of the complaint, it appeared that the plaintiffs were the originating, active persons responsible for the establishment of the very injury which was the focus of the action — the proximate cause of their own injury. Such a holding is entirely consistent with *PermaLife, Javelin* and *Southwest.*

In *Kastenbaum v. Falstaff Brewing Co.,* 514 F.2d 690, 695 (5th Cir. 1970), the Fifth Circuit reversed the jury verdict favoring the plaintiff for failures in proof. *Perma Life* was affirmatively cited by the plaintiff as authority for the proposition that he had the right to recover all costs incurred in price fixing promotions regardless of whether he was compelled to participate or participated voluntarily. The Fifth Circuit disagreed, citing that portion of Justice Black's opinion in *PermaLife* permitting consideration of active participation in computing damages. Again, this holding is in harmony with *PermaLife, Javelin* and *Southwest.*

Lastly, Petitioner cites *Premier Electrical Construction Co. v. Miller-Davis Co.,* 422 F.2d 1132 (7th Cir. 1970). The Seventh Circuit reversed the district court's award of summary judgment on the issue of *in pari delicto,* and remanded for a factual inquiry into whether there existed relative bargaining power between the parties, whether the plaintiff was forced by economic pressure to enter into the agreement and whether the plaintiff had initiated any provision of the agreement at issue. The holding of the court, that *PermaLife* dictates that plaintiffs who do not bear equal

responsibility for creating and establishing an illegal scheme or are forced by economic pressures into such a role are not barred from recovery, is clearly consistent with *PermaLife*.

The Eighth Circuit, not discussed by Petitioner, expressly adopted the *Javelin* test in *International Travel, Etc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1262 n. 10 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

The Tenth Circuit has also reconciled the "conflict" between the circuits. *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 431 (10th Cir. 1977), citing *Javelin*, *Greene*, and *Premier Electrical*, *supra*, as similar interpretations of *PermaLife*.

CONCLUSION

The unresolved question raised in the *PermaLife* opinion is not raised by this record. The opinion of the Ninth Circuit in *Southwest Marine* is based upon the legal issue of agency and not a substantive re-examination of the rule of *PermaLife*. The circuits are not in conflict. In fact, over time they have and are continuing to forge a consensus rule on the issue which is a proper function of the circuit system.

For the reasons set forth above, the Petition should be denied.

Respectfully Submitted,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

PETITIONER'S CONDUCT BEFORE THE SAN DIEGO PORT DISTRICT, WHICH RESPONDENT CLAIMS TO BE AT ISSUE, IS ANTITRUST-IMMUNE UNDER THE NOERR-PENNINGTON DOCTRINE

Triple "A" Machine Shop's petition for certiorari seeks review of the Ninth Circuit's decision that respondent cannot be barred from recovery by reason of the *pari delicto* of its alter ego, Arthur Engel, in negotiating and executing the contract (the Users' Agreement) which denied respondent access to the drydock owned by the United States Navy and leased by the San Diego Port District. In its opposition

brief, respondent seeks to eclipse that issue from this Court's inquiry. Respondent argues that negotiating and executing the Users' Agreement may not be considered in applying the defense of *in pari delicto*. This, respondent contends, is because that is not what constitutes the antitrust violation alleged here.[1] Consequently, respondent argues, "subsequent acts of implementation and encouragement must be evaluated" to determine if the antitrust plaintiff is *in pari delicto*. From this respondent concludes that it is not *in pari delicto* because it did not participate in that conduct (Brief in Opposition, pp. 7-8).

The Court may assume that subsequent efforts by defendants to advocate enforcement of the Users' Agreement constitutes the conduct to be considered on this petition. But this only confirms that certiorari should be granted here for still another reason: When the conduct in question is that of petitioning a governmental agency to enforce a valid contract (respondent having acknowledged the contract itself to be lawful), that petitioning conduct is plainly not proscribed by the antitrust laws according to this Court's decisions in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)

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[1]Respondents contended below that initiation and execution of the Users' Agreement, by itself, "would not violate the antitrust laws" (CR 244); rather, "[i]t was that decision [to oppose a waiver of paragraph 31(b) and (c) for respondent only] by defendants which breathed economic life in sections 32(b) and (c) and it is that decision from which all damages to it resulted" (CR 272). Repeatedly, respondent contended that adoption of paragraph 32(b) and (c) was an "economically benign act" and "no economical effect was produced until the sections were enforced." (CR 249).

and their progeny. Under the *Noerr-Pennington* doctrine, *bona fide* efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from antitrust liability. As this Court declared in *Noerr,* 365 U.S. at 185, "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." Nor does it matter that petitioner's intent in seeking governmental action is to restrict its competitors. As this Court also concluded in *Noerr,* "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." 365 U.S. at 139.

In this case, defendants "enforced" the Users' Agreement by appearing and opposing respondent's petition to the San Diego Port District. The Port District was both a party to the Users' Agreement and the government agency authorized to determine whether to waive or enforce its terms. When Arthur Engel petitioned the Port District in 1977 to waive the experience and financial requirements of the Users' Agreement as to respondent alone, petitioner appeared before the Port District's Board of Commissioners to express its view that such requirements were reasonable and necessary. At the Port District's behest, the Port District staff then conducted a study and reported that such experience and financial requirements should be upheld as to all and that no special waivers were justified. Based upon its staff's recommendation, the Port District denied respondent's application for a waiver of those requirements.

Thus respondent petitioned the Port District to grant a waiver, Triple "A" and others opposed respondent's petition, and respondent lost. Just as respondents' appear-

ance before the Port District was protected activity under the First Amendment, so was petitioner's appearance in opposition to respondent's application. Indeed, the action of which respondent complains—the denial of a special waiver for its sole benefit—was not even taken by petitioner but by the Port District in its official capacity.

Following trial of this action below, the Ninth Circuit ruled in a strikingly analogous case entitled *In Re Airport Car Rental Antitrust Litigation,* 693 F.2d 84 (9th Cir. 1982), *aff'g,* 521 F.Supp. 568 (N.D.Cal. 1981), that defendants' concerted efforts to induce municipal airport authorities throughout the United States to grant them exclusive contracts to operate car rental concessions and to exclude plaintiffs from those airport markets was lawful under *Noerr-Pennington.* The district court in *Airport Car Rental* found, and the Ninth Circuit agreed, that defendants' petitioning conduct was not "merely exempt" but that the Sherman Act—as construed by this Court—simply does not prohibit joint efforts to induce governmental action, 521 F.Supp. at 575; 693 F.2d at 87-88. Rejecting plaintiffs' argument for a "commercial activity" exception to *Noerr-Pennington,* the court in *Airport Car Rental* reiterated this Court's pronouncement as to the purpose and breadth of the *Noerr-Pennington* doctrine:

> "Activities intended to influence public officials in making commercial decisions are entitled to protection not merely as proposals of a commercial transaction. Regardless of any collusion or purpose to gain a commercial advantage over competitors, they are a vehicle for communicating information to public officials. As the Supreme Court said in *Noerr,* it is people seeking

> official action to 'bring about an advantage to themselves and a disadvantage to their competitors . . . who provide much of the information upon which governments must act.' 365 U.S. at 139, 81 S.Ct. at 530. Commercial speech therefore enjoys First Amendment protection not only as an exercise of the right to speak and petition but also to guard the reciprocal right of the public, through its officials and agencies at all levels of government, to receive information." 521 F.Supp. at 581.

Defendants' petition for writ of certiorari already raises an important and substantial issue for review: whether truly complete involvement and participation in an antitrust conspiracy by respondent's alter ego should bar respondent's antitrust cause of action. As this Court has not addressed the *in pari delicto* doctrine for sixteen years (since *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968)) and has never faced the issue at hand, certiorari should be granted to clarify the scope of this important antitrust doctrine.

But that is not the only reason why certiorari should be granted here. Respondent's brief in opposition raises a separate and no less significant issue: If defendants' joint enforcement of the Users' Agreement before the Port District must be considered in deciding whether respondent was *in pari delicto* under *Perma Life*, as respondent insists, may that same conduct be the basis for holding that petitioner violated the antitrust laws in light of *Noerr-Pennington* as construed by the Ninth Circuit in *Airport Car Rental*? Because *Noerr-Pennington*

addresses whether conduct is prohibited by the antitrust laws in the first place, while *in pari delicto* merely allocates fault once an antitrust violation is found, this Court's answer should be as clear as it is significant.[2]

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[2]At a minimum, petitioner requests the Court to remand this action to the district court with directions to reconsider its finding of antitrust liability in light of the *Noerr-Pennington* doctrine as construed by the Ninth Circuit in *Airport Car Rental*.